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THE ENIGMATIC BUT UNIQUE NATURE OF THE ISRAELI LEGAL SYSTEM

AE Platsas*

1 Introduction

This article negotiates the *prima facie* enigmatic but, certainly, *secunda facie* unique nature of the Israeli legal system. To the comparatist the system in question acts as an enigma, an enigma which, upon closer inspection, hides a most fascinating hybridisation of legal-cultural aspects creating a unique legal blend. Concentrating on the powerful character of the Israeli Supreme Court, the author maintains that the role of the Israeli Supreme Court's judges has reinforced the unique character of the system in question. Yet, close to the developments in the sphere of the Supreme Court, Israel, as a legal system, presents an unparalleled set of developments in the constitutionalisation of its core elements of public law and private law. These elements will be explored in turn. Methodologically, the article operates in the wider premises of comparative law by following a contextual analytical mode comprising socio-legal and legal-historical elements. The analysis will commence with a brief note on the overall analytical approach to be followed (section 2). Thereafter, in section 3 herein the historical development of the modern Israeli legal system will be provided. In section 4 there will be appreciation of the legal, political and social forces in modern Israel, whereas in section 5 the focus of the analysis will revolve around one of the key players of innovation in the modern Israeli legal system, the Israeli Supreme Court. The article examines the constitutionalisation of the public and private law sphere in section 6 and 7 respectively. The contribution concludes with a finding suggesting that Israel is a legal system in *kinesis* (as opposed to it being a legal system in *stasis*).

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2 Solving the Israeli legal enigma

To go beneath the surface of the Israeli legal system, ie beyond the fact that this legal system, as any other system, is in the first instance "an operating set of legal institutions, procedures, and rules",[1] one needs to comprehend the modern Israeli society as well as the historical background to the modern Israeli State. Therefore, to comprehend the Israeli legal system, one needs to appreciate the structures, essence and fundamentals of Israel as a whole. Little is really known, in this respect, outside of Israel. The author too, largely because of his European roots, came to realise that Israel is not exclusively a Jewish State (when actually this is the perception of many abroad). Israel is a multi-cultural State;[2] indeed a State of different religions (despite the fact that the Jewish cultural-religious element is clearly the predominant one).

3 The birth of a new legal system in 1948

Prior to the establishment of the State of Israel in 1948 and before the British Mandate in Palestine, which took the form of British military occupation in the period between 1917-1918 and the form of civilian administration from 1922 onwards, the area of today's Israel was part of the Ottoman Empire, the laws of which applied. In the second half of the 19th century the effect of European law on the Ottoman Empire's laws increased as a whole.[3] The Mejelle, however, which was the Ottoman codification of Islamic Law, was not of European orientation. This was the central piece of legislation in civilian matters in the Ottoman Empire and correspondingly in Palestine. Whilst the old laws of the Ottoman Empire continued to apply during the years of the British Mandate, a slow but steady process of *Anglification* of Palestinian law in the area emerged; this process reached its peak in 1944, even if the Mejelle would not be annulled.[4] The effect of English law continued to some extent after the birth of Israel, as English law would still operate in many aspects of the legal system and affect many substantive areas of law in the newly formed State. Yet, whilst one would see the steady decrease of Ottoman law influence in Palestine in the years of

1 Merryman and Pérez-Perdomo *Civil Tradition* 1.
2 Mautner *Law and Culture of Israel* 181-200.
3 Barak "Introduction to the Israeli Draft Civil Code" 1.
4 Barak "Introduction to the Israeli Draft Civil Code" 3.

the British Mandate, one identifies a relatively similar trend post 1948 with the *Israelisation/neutralisation* of English law,[5] the symbolic peak of such movement having been reached in 1980, when Israel established its Foundations of Law 1980. By virtue of this Law, Israel would formally disconnect from the English legal tradition[6] (even if at the time the role of English legal precedent played a minor role; a role which was already limited in 1957 with the decision of *Kohavi v Becker*). In 1984 the Mejelle was annulled altogether.[7]

In full declaratory terms, the State of Israel was already a reality in 1948 with its Declaration of Independence.[8] In full constitutive terms, the State of Israel achieved full UN membership (and thus full UN recognition) in 1949.[9] In any case, a new legal system was born through the Israeli Declaration of Independence already in 1948. The State of Israel had been crystallised into a reality. Correspondent to this was the creation of a new legal reality, the laws of which have been to a considerable degree the result of comparative research[10] and historical choice. Yet, as this analysis will conclude, the enigmatic nature of this new legal reality arises out of the fact that Israel is a young legal system. In terms of legal development, the author opines, the two generations of legal development in Israel amount to a drop in the ocean of legal history in human affairs. This being the case, Israel offers us unique features of paradigmatic legal development despite its short legal history. The enigma, upon careful examination thereof, becomes then a realisation of certainly positive developments in the internal legal structures of Israel.

5 Barak "Introduction to the Israeli Draft Civil Code" 6.
6 Barak "Introduction to the Israeli Draft Civil Code" 5.
7 Barak "Introduction to the Israeli Draft Civil Code" 5.
8 Weiler 2011 *EJIL* 622.
9 Israel was granted United Nations membership one year after its declaration of independence (*United Nations GA Res A/RES/273 (III)* 11 May 1949). According to the declaratory school of international law Israel became a State on the 14th of May 1948 by way of its very declaration of independence. According to the constitutive school of international law Israel became a State on the 11th of May 1949 when recognition of this State was attained in the United Nations. Alternatively, one could argue that Israel, as an entity in the face of international law, was constitutive of itself already through the *de facto* and *de jure* recognitions it received in 1948 and 1949, recognitions which came prior to the UN membership of Israel.
10 Barak "Introduction to the Israeli Draft Civil Code" 4.

4 The cultural, political and legal forces in the Israeli society

To proceed with our analysis, we need to appreciate the existence of certain political, cultural (as in religious) and legal forces in the State of Israel.[11] As a whole, the Israeli legal system today is pluralistic and multicultural.[12] The following diagram[13] should give us a rough outlook of the state of affairs in this respect in the modern State of Israel, especially when it comes to the defining characteristics of the legal system in question. The equal size of the shapes used in the diagrammatical exposition of the socio-legal system of Israel does not necessarily signify that the different sub-elements falling within the same element are of equal importance in the development of the modern Israeli legal system. Accordingly, the diagram is for the purposes of indicative illustration only.

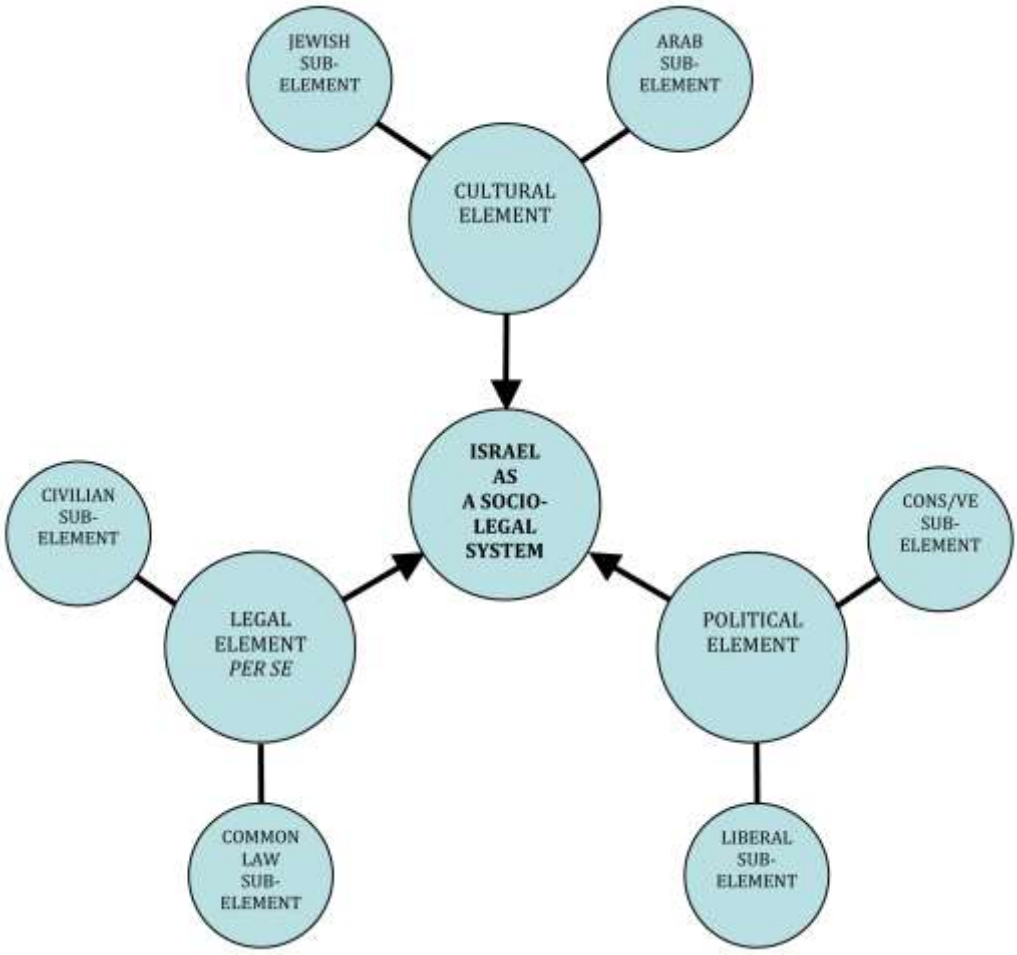

Diagram: Composite character of the socio-legal system of Israel

11 Jacobsohn "Formation of Constitutional Identities" 135.
12 Mautner *Law and Culture of Israel* 115.
13 See the diagram which follows herein in relation to the composite character of the socio-legal system of Israel.

When it comes to the legal forces of Israel, one clearly sees the effect of both civilian and common law jurisprudence. When it comes to the particular influences, there has not been a clear predominant force. For instance, the civilian element of the Israeli legal system seems to be one which has been influenced in variable degrees and at different places by the German, French and Italian schools of legal thought. As such, Israel stands for a hybrid legal system of a highly independent nature. Naturally, this hybridisation between the civilian and the common law tradition does not occur in Israel only but also in other legal systems around the world e.g. in the Cameroonian legal system, the Japanese legal system and the system of the State of Louisiana, to name a few. A hybrid legal system is perceived as one which, in qualitative terms, combines and to a certain degree fuses different legal traditions (as in different legal mentalities).[14] However, the crucial difference between the approach followed in Israel and the realities of other hybrid legal systems is that in Israel the choice of certain legal approaches (whether civilian or common law-oriented) was a matter of clear legislative choice. Also, Israel, it has to be stressed, started as a common law system but moved towards civilian law "so that it is now a mixture of the two".[15] In methodological terms, the typical example here would be the re-orientation of the Israeli legal system towards a more typically civilian structuring of its laws (even though the substance thereof is predominantly common law based). Even more interestingly, a silent legal force in Israel is that of the Israeli constitution. The Israeli constitution is one with a small 'c'. Thus, in the sphere of constitutional law, Israel, together with New Zealand and the United Kingdom, does not have a 'written' Constitution,[16] as in a single consolidated constitutional text/code. Instead it has a *sui generis* constitution made out of a number of basic laws.[17]

When it comes to the cultural forces of Israel, even though Israel is a "Jewish and democratic" State in official terms, it would be an omission not to state that this legal system comprises the predominant cultural element of the Jewish tradition and to a lesser extent the cultural element of its Arab population. However, the latter cultural element stands for 20% of the country's population.[18] Furthermore, the Jewish

14 For new perspectives in the subject area see generally Örücü *Mixed Legal Systems*.
15 Goldstein "Israel" 449.
16 Mautner *Law and Culture of Israel* 178, 187.
17 Mautner *Law and Culture of Israel* 178-180.
18 Mautner *Law and Culture of Israel* 189, 194.

cultural element is not uniform; it actually comprises four (4) different educational-cultural streams within: the statist-secular stream, the religious-Zionist stream, the Ashkenazi Orthodox stream, and the Sephardic Orthodox stream.[19] Accordingly, the Israeli legal system is by definition multi-cultural.[20]

When it comes to the Jewish population of Eretz Israel, one notes the clear political division between the more conservative-oriented forces of Israel and the more liberal-oriented forces of Israel. Somehow this distinction in modern Israel is the descendant of the old ideological division between the *maskilim* and the rabbis.[21] This 'new-old' division does not only cause a schism to the Jewish population itself in Eretz Israel, but also a great division in matters related to religion, politics and the law. On the other hand, one of the great contributions of the liberal-oriented forces of Israel has been the fact that the Israeli legal system has the legal characteristics of a secular legal system (despite the predominance of the Jewish religion). Perhaps, the right position here would be that, whilst "Israel is anything but a secular [S]tate"[22], the Israeli legal system is a secular one. In the public law sphere this secularity has always been the expectation since the inception of the modern State of Israel. In the private law sphere, Israeli law guarantees freedom of religion by allowing individuals to subscribe to a religion as they see fit. Israeli law is liberal law.[23] Thus, since the creation of the modern State of Israel the liberal/secular element of the Jewish population defined the country's law, politics and orientation. Indeed, the majority of Israel's citizens seem to have embraced this model of democracy, liberal democracy.[24] It remains to be seen whether this will be the case in the next few decades, but it would seem that the overwhelming majority of the Israeli population would subscribe to the ideal of a liberal democracy for their State.

19 Mautner *Law and Culture of Israel* 188.
20 Mautner *Law and Culture of Israel* 181-200.
21 Mautner *Law and Culture of Israel* 13.
22 Blank 2012 *Is L R* 296.
23 Mautner *Law and Culture of Israel* 30. For the purposes of our analysis, our assessment excludes the assessment of Israeli family laws (as opposed to Israeli family law) in that there is divergence in the application of such law depending on the religious background of the individual and the locality in which such law would apply. Nonetheless, this divergence of the family laws applicable in the State of Israel based on religious considerations does not alter the liberal picture of the Israeli legal system as a whole. In fact, the degree of pluralism in the subject area reinforces such picture. On such degree of pluralism in the Israeli legal system when it comes to legal matters touching upon religion see e.g. Blank 2012 *Is L R* 293-302, 315-317.
24 Mautner *Law and Culture of Israel* 202.

Finally, with regard to the classification of the Israeli legal system, it should be noted that this is a system that can be classified in the Western legal culture.[25] To state, thus, that Israel is a Western legal system in the Middle East would be a statement that reflects the legal-geographical character of this system. The State's ideology is based on the rule of law whilst, as stated, secularity, democracy and legal reason define the operations of the system as a whole.[26] As such modern Israeli jurisprudence is one that corresponds to Western jurisprudence.

5 The Israeli Supreme Court as a defining engine of the Israeli legal system

In addition to the above points, the author wishes to maintain that the Israeli legal 'blend' becomes an even more interesting one by way of interference of a pro-active Supreme Court. Edelman and Mautner argue that the system in question boasts the most activist Supreme Court in the world.[27] This state of affairs is not one without criticism.[28] So too the main accusation against the pro-active approach of the Israeli Supreme Court is that such an approach might have turned Israel into a *Richterstaat*. The author opines that, as things stand, despite the fact that the Israeli Supreme Court judges hold a significant degree of judicial power, which they have certainly exercised in the past, that is not to say that the country has reached the point where it could be classified as a *Richterstaat*. In any case, except for the Israeli Supreme Court being the head of the Israeli judicial system and the supervisory body of all State tribunals in Israel,[29] there are at least three different ways under which the Court accumulated the degree of power which it currently holds:

- first, by bringing changes to its jurisprudence;[30]
- second, by exercising a considerable degree of control over the executive and the legislature;[31]

25 Barak 2002 www.ejcl.org.
26 Barak 2002 www.ejcl.org.
27 Edelman "Israel" 407; Mautner *Law and Culture of Israel* ix.
28 Mautner *Law and Culture of Israel* 170-180.
29 Goldstein "Israel" 456; Mautner *Law and Culture of Israel* 57.
30 Goldstein "Israel" 456; Mautner *Law and Culture of Israel* 57.
31 Mautner *Law and Culture of Israel* 61-67.

- third, by granting itself powers,[32] which were not originally contemplated[33] largely due to a pro-active judiciary.[34]

The changes in the jurisprudence of the Supreme Court came about due to the re-alignment of operations of the Court from a formalistic type of an institution to a value-oriented institution of a certain political[35] character. In particular, the value system which the Court promoted was that of liberal legal ideology, human rights being at the centre of that value system.[36] Additionally, the relevant changes then in the "Israeli separation of powers game" are ones that came about as the result of evolution in the Court's operations. Accordingly, Mautner argues that the Supreme Court and the *Knesset* both "take part in normative and distributive decisions".[37]

It would also be fair to argue that the strategic positioning of the Supreme Court as a "stronghold of liberalism" in the Israeli society was neither an accident nor some sort of planned development.[38] When petitions were made to the Court by those who felt that they were losing power in the new political environment of the 1980s and the 1990s, the reaction of the Court in upholding the claims of these petitioners was simply a case of "culture bound action".[39] Equally, those same political forces that had lost the battle at the *Knesset* front wished to move their ideological struggle for a liberal State of Israel to a new 'battlefield': that of the Supreme Court. As a result, from an introvert court that the Court initially was, it has turned subsequently into an extrovert court. Innovation then in the Israeli jurisprudence has been the case in that the Court moved away from the introvert court that this may have been prior to 1980. Typical examples of such departure from an introvert stance would include, at the abstract level, the expansion of justiciability in the Supreme Court's operations and,

32 The operations and powers of the Supreme Court of Israel are regulated by a number of instruments. A central piece of legislation of constitutional significance governing the Court is the Basic Law on the Judicature, that is the Courts Law [Consolidated Version], 5744-1984 (*Israeli Basic Law on Courts* 1984). Beyond this, the Court's judges have the exceptional power to operate in a number of non-judicial functions, i.e. to chair Commissions of Inquiry under the Commissions of Inquiry Law, 5729-1968 (*Israeli Commissions of Inquiry Law* 1968) and to supervise *Knesset* elections under the Knesset and Prime Minister Elections Law (Consolidated Version), 5729-1969 (*Israeli Knesset and Prime Minister Elections Law* 1969).
33 Mautner *Law and Culture of Israel* 68.
34 See 5.1 and 5.2 herein for more on this.
35 Mautner *Law and Culture of Israel* 147.
36 Mautner *Law and Culture of Israel* 80.
37 Mautner *Law and Culture of Israel* 1, 148.
38 Mautner *Law and Culture of Israel* 144.
39 Mautner *Law and Culture of Israel* 144.

at the more practical level, the consideration by the same forum of cases such as the one that dealt with the deportation of Israeli residents in cases of state of emergency as in *The Association for Civil Rights in Israel v Minister of Defense.*[40]

Nonetheless, it would also be appropriate to argue that the Court itself has not been the sole engine of legal innovation in the Israeli legal system. The *Knesset* in 1992 with the introduction of two new Basic Laws re-aligned the Israeli legal system to an approach whereby Jewish values were further recognised in the law of the State.[41] This being the case, the author would opine that the Supreme Court in Israel has served legal innovation to a greater degree than the executive or the legislature.

5.1 The Israeli Supreme Court's activism as a defining element of innovation

The first thing to be noted is that the Israeli Supreme Court tends to operate within the circle of secularity[42] (as does almost the totality of the equivalent courts in the Western world). Concurrently, the Court also served and still serves in the definition of the cultural identity of Israeli law.[43] This degree of innovation must have been the result of a clash of different ideological perceptions about the cultural orientation of Israel. Mautner maintains that the "liberal former hegemons" lost power in the political and cultural sphere of Israel, whilst they sought resort in the quintessentially liberal character of the Supreme Court.[44] In essence, the question that the Israeli Supreme Court faces, in one way or another, is whether or not Israel is fused into a State combining State and religion or a State dividing State and religion.

In other countries this has been explicitly dealt with by the very operation of constitutional law text. In the USA, the separation of State and religion is a fact of law and life. Greece, on the other hand, presents a typical example of a European State

40 HCJ 5973/92 *The Association for Civil Rights in Israel v Minister of Defense* 47(1) PD 267.
41 Mautner *Law and Culture of Israel* 44.
42 Mautner *Law and Culture of Israel* ix.
43 Mautner *Law and Culture of Israel* ix. Illustrative cases in the matter include: HCJ 5973/92 *The Association for Civil Rights in Israel v Minister of Defense* 47(1) PD 267 (on the examination of the deportation legal basis of Arab residents of Israel to Lebanon in a state of emergency) and HCJ 8638/03 *Amir v Great Rabbinic Court in Jerusalem* (unpublished) (on the limitation of religious courts to matters of marriage and divorce only, unless otherwise authorised by explicit granting of powers through *Knesset* legislation).
44 Mautner *Law and Culture of Israel* 1-2.

which effectively fuses Church and State into one.[45] What is clear in the case of Israel is that, whilst there is no official religion in the State, there does not seem to be separation of church and State.[46] This question is not one which has been fully resolved in the modern State of Israel. The boundaries remain largely unclear in this particular area (and maybe rightly so, as this helps the co-habitation of different elements in the legal system).

Beyond this, to return to the Supreme Court, unlike other national Supreme Courts, it is the Supreme Court of Israel itself which dominates the appointment process[47] of its judges. This can be advantageous in the sense that in a pure separation of powers model the judges might be the best-placed persons to actually pinpoint which of their colleagues should reach the highest ranks of the judicial function. Nonetheless, this approach may be a problematic one, especially if we perceive the Court's involvement in the appointment of its judges as a political exercise.[48] In this respect, this may be an area on which the Court as an institution can improve its mechanisms.

Moreover, despite the largely secular character of the Court, the Court has been attacked not only by the more religious Israelis, but also by the more secular Israelis.[49] For a court this can only be a good thing. Courts do not exist to appease the public. The performance of a court is not to be measured by public perception indicators. A court is not to operate in anyone's favour. Perhaps a court should hear society but not necessarily listen to it (unlike the legislator who may have to do so). Justice is blind (but not deaf). If these largely axiomatic statements are true, then there is only reason to believe that the Supreme Court largely did and still does its job as it should. The fact that the Court upholds to this day the overall secular

45 The Greek Constitution operates "In the name of the Holy and Consubstantial and Indivisible Trinity" (Quasi-Preamble to the Constitution), whilst Article 3 of the Constitution clearly stipulates that "The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ".

46 Barak 2002 www.ejcl.org.

47 The President of Israel appoints Supreme Court judges upon their nomination from the Judges' Appointment Committee. The Judges' Appointment Committee comprises the following: three (3) members of the Supreme Court itself (including the President of the Supreme Court), two (2) Ministers (one of whom is the Minister of Justice), two (2) members of the *Knesset* and two (2) members of the Israeli Bar Association. The Committee is formally presided over by the Minister of Justice.

48 Mautner *Law and Culture of Israel* 8, 164-167.

49 Mautner *Law and Culture of Israel* 160-161, 163, 226.

character of the Israeli State is certainly something which defines its operations but – equally – the fact that the Court may have somewhat departed from its liberal roots (in that even the liberal part of the Israeli population have attacked it) may mean that the Court actually upholds the axiomatic truths of justice and fairness. Another very interesting point is that, up until the mid-1990s, the Court was not the recipient of criticism.[50] Continuing with the thread of our argument, one could not opine that the Court operated efficaciously before the mid-1990s simply because it did not receive criticism, nor simply because it received criticism after the mid-1990s that it did not. That would be a legal fallacy. Political criticism does not necessarily equate or amount to legal criticism in that political motivations serve one thing, whilst pure legal argumentation in the delivery of justice serves quite another thing. Thus, our position whereby we support the operations of the Supreme Court as largely correct in its historical path remains, irrespective of criticism this forum received post mid-1990s.

Furthermore, the centrality of the Supreme Court in the operations of the legal system has resulted in it becoming a guardian, an advocate of an "unwritten constitution of basic rights",[51] especially in the sphere of negative civil rights and liberties (as opposed to the Court's approach in the sphere of positive social rights, where its approach has always been much more restrictive).[52] That is not to say that the Supreme Court would create its 'own' constitution of such rights disregarding the *Knesset*. On the contrary, the Supreme Court would add a layer of protection of basic political and civil rights for Israeli citizens in the absence of explicit regulation to the effect of such rights.[53] Finally, we should not neglect the fact that the Supreme Court has actually negated *Knesset* legislation when such legislation went against constitutional principle.[54] This has been perceived as the Supreme Court's pinnacle of judicial activism.[55] In this respect, it would be an omission, if we did not submit that the Supreme Court did not only "create the law" for the State of Israel together with the *Knesset* but that it also went farther than that: it occasionally determined the values of the legal system as a whole by standing *above* the *Knesset*.[56]

50 Mautner *Law and Culture of Israel* 154, 160.
51 Mautner *Law and Culture of Israel* 39.
52 Mautner *Law and Culture of Israel* 151.
53 Mautner *Law and Culture of Israel* 39.
54 Mautner *Law and Culture of Israel* 73-74, 147.
55 Mautner *Law and Culture of Israel* 73-74, 147.
56 Mautner *Law and Culture of Israel* 98.

The Supreme Court has also resisted the *Halakhah* by showing a clear preference to Anglo-American jurisprudence.[57] Can this choice be conceived as an innovative step in the erection of the Israeli legal system? A secular comparative lawyer would prefer this approach in the sense that this approach, as followed by the Supreme Court judges, points to secular law thus filtering religious elements in the delivery of justice. A legal sociologist, on the other hand, would not necessarily prefer this approach in the sense that judicial resistance to *Halakhah* could be perceived as a silencing of one of the cultural elements of Israel. Clearly, the answer to this question is one of perception. In addition, one would opine that this approach prior to the two Basic Laws of 1992 (Human Dignity and Liberty & Freedom of Occupation) may have been well-married to the legal idea of the system as a whole post-1992, ie that Israel is a "Jewish *and* democratic"[58] State.[59] In other words, the Supreme Court may have pre-empted the 1992 legislation in jurisprudential terms, if not pre-initiated it, by its choice in favour of Anglo-American law close to the undercurrents of a society which may have wanted a stronger affinity to its traditional basis of Jewish law *and* democracy. However, despite the clear traditional orientation of the Supreme Court's jurisprudence towards Western law, it has to be maintained now that the Supreme Court judges post 1992 are normally to have two poles of influence in their operations: liberalism *and* Judaism.[60]

Moreover, the Court, post 1970s, moved much closer to a purposive/teleological approach in the interpretation of the law. This has been a further development in the sense that Israeli Supreme Court judges were normally accustomed to an approach whereby the law was given its meaning by way of language. From the 1980s onwards, as Justice Shoshanna Netanyahu noted: the language of the law is

57 Mautner *Law and Culture of Israel* 40.

58 Section 1a of the Basic Law on Human Dignity and Liberty and s 2 of the Basic Law on Freedom of Occupation. Lerner argues that the inclusion of the words 'Jewish' and 'democratic' signifies an attempt to bridge the ideological rift over the character of the State. See Lerner *Making Constitutions* 80.

59 Hirschl argued that the bourgeois forces of Israel, largely subscribing to the liberal ideological core of Israeli society were the driving force behind the 1992 constitutional laws. For more see Hirschl *Towards Juristocracy*.

60 Mautner *Law and Culture of Israel* 45.

> only the starting point of interpretation, not its ending ... We must still examine the aim of the legal provision and its purpose, and choose from among the various options sustainable by the provision's language the interpretation leading to the realization of its aim.[61]

Clearly, this re-alignment of interpretative devices by a move on the part of the Supreme Court giving recognition to a teleological mode of operations meant that the Court departed to a greater degree from its formalist roots by contesting certain assumptions of formalism e.g. that legal norms are exhausted by their language.[62] Accordingly, this move away from formalism has manifested itself in a number of different ways: the Court's departure from the focus on language, the repositioning of the Court's examination of administrative law breaches from an *ultra vires*/*intra vires* analysis to a substantive operations analysis, the Court's following of case law in a less than religiously faithful way. This re-alignment seems to be true for all the judges in the Israeli legal system nowadays.[63]

5.2 A house of liberalism at the heart of the Israeli legal system: the Supreme Court

The Israeli Supreme Court is a house of liberalism. This has been clearly a strategic choice on the part of the Supreme Court judges, because a choice has been made. A choice has had to be made. The choice has been clear: that of secular liberalism. The rationale, it would seem, was that Israel, despite its 1992 recognition of Judaism as a constitutional pillar (together with that of democracy) is a secular State. Rather than the judges of the Court to opt for a State where religion plays a predominant role, the judges have opted for a State where the element of secularity is clearly protected. Anyone could accuse the Supreme Court and almost everyone has accused the Court for its decisions, but few would be able to accuse the Court for not upholding the truths of secularity. As mentioned above, the author opines that the attacks which the Court received from various quarters of Israeli society can be perceived as a positive state of affairs in the assessment of the Court's operations. Here is why:

61 IBA App 11/86 *Ben-Haim v Tel Aviv District Committee, Israel Bar Association*, 41(4) PD 99, 103 as cited in Mautner *Law and Culture of Israel* 93.
62 Mautner *Law and Culture of Israel* 94.
63 Goldstein "Israel" 460-461.

> [Judges] should not abandon their role as protectors of human rights in a free and democratic society. They should not defer to the other branches when it comes to the question of the proper balance between competing constitutional values. They should not be apologetic for their nonrepresentative character. Courts are not representative bodies, and it would be a tragedy if they were to become representative. Their role is to give effect to the deep values of their society as expressed in its basic documents, its traditions, and its history. Their role is not to express the mood of the day.[64]

Unlike the Supreme Court of the United States of America, which confines the operations of the American legal order, the Israeli Supreme Court has gone one step further than that; it has actually defined some of the operations of the Israeli legal system. Unlike the Supreme Court of Japan, which is world-renowned for its reticence,[65] the Supreme Court of Israel stands for the most pro-active Court of the kind in the world. In this respect, this is a prescriptive court by negating legislative matter (as opposed to the prescriptive character of the *Knesset's* lawmaking powers of positing legislative matter). The Court will prescribe the ethos of the legal system by blocking legislation which goes against a liberal legal ethos; it will not uphold claims based on parochial religious assertions; it will promote freedom, justice and democracy as much as possible in the Israeli society. This in itself is innovative in that the Israeli Supreme Court in a subtle but dynamic way affected and affects the very ideological structures and co-ordinates of the Israeli legal system. This is not the case in the United States, where the Supreme Court rarely functions as the central power for fundamental structural change.[66]

6 Constitutionalisation of the public law sphere

In the public law sphere of Israel one notes different developments in different areas of law. In short, penal law is a codified area of law, whilst constitutional law is not a codified area of law (in that it is not consolidated in a single piece of legislation). Interestingly, full codification[67] of penal law was achieved already since 1977, whilst, as we shall see, it was thought already since 1950 that codification/consolidation of the constitution should not be the case.

64 Barak 2002 ww.ejcl.org.
65 David and Brierley *Major Legal Systems* 541; Chen 2010 *ICON* 849-884, 855, 883.
66 Guinier 2009 *B U L Rev* 539-561, 554.
67 Penal Law 5737-1977 (*Israeli Penal Law* 1977).

Israel does not have a single constitutional text in consolidated form. "Israel's formal constitution is unfinished."[68] Its constitutional law is found in and founded upon a number of different Acts.[69] The political system is of a parliamentary democracy orientation. Overall, the system complies with the separation of powers doctrine (save for the traditionally pro-active role of the Supreme Court). As stated, a unified, consolidated, constitutional text was rejected already in 1950, when the *Knesset* rejected a proposal for such a Constitution. It has been argued that the main reason behind the rejection of the proposal for a Constitution has been the different perceptions/definitions for the newly created Jewish State.[70] Effectively, this meant that the secular element and the religious element of Israel would not agree in the matter. To this day such divergence of opinion persists.[71]

The Israeli constitution is one of an incrementalist nature.[72] It has expanded over time due to a pro-active Supreme Court. The main advantage of the constitution is that Israel may be perceived as a flexible constitutional order. The main disadvantage of it is that there is uncertainty as to the mechanisms of constitutional entrenchment.

The Israeli constitution is supreme: all domestic laws to the contrary will not be upheld (even though in practice there is no distinction between an Act of Parliament and a Basic Law, not, at the very least, in the lawmaking process thereof). Enforcement of the constitutional laws of Israel can occur through the process of judicial review,[73] whilst every Court in the State is entitled to conduct such review.[74] Finally, it has been argued also that all laws of the Israeli legal system should in any case be respectful of the constitution. For instance, the projected new Israeli Civil

68 Darner 1999 *St Louis U L J* 1325-1335, 1335.
69 These include the following: *Law of Return* 1950 (as amended); *World Zionist Organization - Jewish Agency (Status) Law* 1952 (as amended) and the following *Basic Laws*: *The Knesset* 1958; *Israel Lands* 1960; *The President of the State* 1964; *The Government* 1968; *The State Economy* 1975; *Israel Defence Forces* 1976; *Jerusalem, Capital of Israel* 1980; *The Judicature Law* 1984; *The State Comptroller* 1988; *Human Dignity and Freedom* 1992 and *Freedom of Occupation* 1992.
70 Lerner *Making Constitutions* 7, 51, 58.
71 Lerner *Making Constitutions* 8, 32.
72 Lerner *Making Constitutions* 51-52.
73 Darner 1999 *St Louis U L J* 1335.
74 Barak "Introduction to the Israeli Draft Civil Code" 3.

Code would have to "be interpreted in harmony with the basic laws on human rights and freedoms".[75]

Finally, the situation in Israel is one which broadly resembles, in comparative law terms, the constitutional law situation of the UK and New Zealand. These countries, just like Israel, do not have a Constitution; yet those countries, just like Israel, do have a constitution. There are constitutional 'superstatutes'[76] in these countries, even though there is absence of what one would call a canonical Constitution.[77] Yet constitutional canons are the case in the legal order of the United Kingdom and the legal systems of New Zealand and Israel. Accordingly, the differentiation of the constitutional state of affairs between Israel, the United Kingdom, New Zealand and the rest of the world is one of form rather than one of substance.

7 Constitutionalisation of the private law sphere

Predominantly, as of the beginning of 2012, Israel does not have a Civil Code in force. There is, however, a Code of the kind in the making.[78] This has been described as the most ambitious project in the private law of Israel since the inception of the State.[79] It is believed that this Code will fill gaps in the Israeli legal system. A Companies Code and a Bankruptcy Code (in the traditional form of Acts) exist. On the other hand, as Israel to this day has not consolidated its fundamental public law instruments into a Constitution, the private law core too, as found in a consolidated law Civil Code is still non-existent. The UK and New Zealand have

75 Rabello and Lerner "Project of the Israeli Civil Code" 809.
76 Levinson'"Do Constitutions Have a Point?" 150.
77 Levinson'"Do Constitutions Have a Point?" 150.
78 The Code has been envisaged in 1976 by Professor Aharon Barak, then Attorney General and subsequently Supreme Court Justice and President of the Supreme Court of Israel. The initial draft of the Code has been the result of a number of preparatory meetings in a period of more than twenty (20) years. In essence, whilst the Code rejects Continental legal style, it does not reject Continental legal ideas altogether. The Code itself is the result of careful comparative analysis. The legal traditions which have been generally considered are those of the Common law world and of the Civilian world. Principles of traditional Jewish law have been at times resisted in the areas which the Code regulates. The Code has been described by Lerner and Rabello as a "mixed-jurisdiction-sui generis-model", a code which does not otherwise affect areas of law which have been traditionally regulated by religious law in Israel. As such, the Code omits a book on family law, which would be a book normally found in the average Continental civil code. Accordingly, whereas, on the one hand, the Israeli Civil Code has resisted traditional Jewish law to a certain extent, the Code leaves, on the other hand, the religious system of Israel unaffected. For more see Lerner and Rabello 2011 *AJCL* 765-771, 791.
79 Rabello and Lerner "Project of the Israeli Civil Code" 771.

regimes of private law and public law which are not consolidated either in a Civil Code or a Constitutional Code. However, whilst these three (3) legal systems/orders could be of equal approach in macro-comparative terms, Israel now seems to depart from the approach in the UK and New Zealand, as Israel seems to put the weight of its legal efforts behind such a Civil Code. To this effect, it is reported that the Ministry of Justice decided to bring the draft Civil Code to the Commission of Law and the Constitution of the *Knesset*, whilst in March 2011 the Ministers' Commission forwarded the draft to Parliament.[80] It is only hoped then that such a Code will come to life soon.

Traditionally, in the modern State of Israel legislation of private law remit was made on a piecemeal basis.[81] Codification of Israeli civil law took the form of "codification in instalments".[82] There has not normally been direct linkage between one piece of legislation to another.[83] For instance, one observes separate Acts of legislation for agency, sales, gifts, contracts and trusts[84] (when most of these subject areas would normally be incorporated into a Civil Code in legal systems of Continental jurisprudence). Yet, there was some form of a close internal link between these pieces of legislation,[85] in that those separate Acts could otherwise form the basis of a consolidated instrument such as a civil code. However, the very same pieces of legislation lacked a clear united ideology,[86] as they were never destined to form the basis of such a code. From the point of rationalising the matter,[87] a Civil Code would amend the situation of fragmentation of legal information into separate Acts.[88] Over twenty different private laws of civil nature, which have been enacted from the 1960s until today, would be contained in the new Civil Code.[89] Consequently, with regard to

80 Lerner and Rabello 2011 *AJCL* 767.
81 Rabello and Lerner "Project of the Israeli Civil Code" 772-774.
82 Yadin 1979 *Eyonei Mishpat* 506 as quoted and cited in Barak "Introduction to the Israeli Draft Civil Code" 6.
83 Lerner and Rabello 2011 *AJCL* 765.
84 Lerner and Rabello 2011 *AJCL* 765 referring to the *Agency Law* 1965, the *Sales Law* 1968, the *Gift Law* 1968, the *Contracts (Remedies for Breach of Contract)* 1970, *Contracts (General Part) Law* 1973 and *Trust Law* 1979.
85 Barak "Introduction to the Israeli Draft Civil Code" 6.
86 Barak "Introduction to the Israeli Draft Civil Code" 6.
87 Professor Barak would probably name this the "harmonization of the civil law"; see Barak 2002 www.ejcl.org; the point of coherence, systematisation and rational distribution in a forthcoming Israeli Civil Code was raised more recently in Barak "Introduction to the Israeli Draft Civil Code" 8, 10 and in Cohen "Four C's" 55-65, 72-73.
88 Rabello and Lerner "Project of the Israeli Civil Code" 791.
89 Rabello and Lerner "Project of the Israeli Civil Code" 771.

the substantive nature of the Civil Code, it is to be noted that the Code predominantly embraces those separate Acts which pre-existed the Code to be.[90] As such, legal continuity in the civil law sphere of Israel is achieved.[91] Beyond this, like the epigrammatic nature of the separate Acts that pre-existed the Civil Code, the Civil Code to be can be described as laconic and minimalist, since it is limited to approximately 900 Articles.[92] In the preparation of the Code, Israeli legal scholars have, on occasion, resisted Jewish law principles, whilst at other times they have also resisted Continental legal style.[93] Whilst this is a correct statement, the author opines that the very fact that a Civil Code is in the making brings secular Israeli jurisprudence closer to Continental jurisprudence. Equally, one should not neglect the position suggesting that the Civil Code of Israel is a code closely associated with common law,[94] whilst the American model of the Uniform Commercial Code is a useful paradigm for understanding the common law roots of the Israeli Civil Code.[95] On the other hand, whilst many of the fundamentals of the Israeli Civil Code are of common law orientation (e.g. by way of previously common law inspired instruments such as the Tort Ordinance of 1947, the Breach of Contract Law 1970 and the Trust Law 1979)[96], Continental legal ideas have found their way into the Civil Code. Typical examples of Continental legal structural and substantive ideology found in the Israeli Civil Code would be the inclusion of a section, albeit a short one, on principles, definitions and juridical acts (resembling *mutatis mutandis* the operations of the General Part of the German Civil Code); the inclusion of the requirement of good faith; the inclusion of the *de minimis* principle and the inclusion of the principle that the wrongdoer will not benefit from his wrongdoing.[97] Common law solutions are certainly more prevalent in the Code in that, as stated, the Code consolidates old common law based Acts. As stated, these solutions include: the principles of

90 Lerner and Rabello 2011 *AJCL* 772 citing Neubauer 2006 *Mishpatim* 875, 907.
91 Cohen "Four C's" 72.
92 For comparative law purposes the length of a number of indicative European Civil Codes is as follows: the *Dutch Civil Code* comprises 4727 Articles, the *French Civil Code* is made out of 2302 Articles; the *German Civil Code* is made out of 2385 Paragraphs; *the Greek Civil Code* is made out of 2035 Articles, the *Italian Civil Code* is made out of 2969 Articles, the *Swiss Civil Code* is made out of 977 Articles, whilst the *Spanish Civil Code* is made out of 1976 Articles. It is noted, of course, that none of these codes covers the very same subject areas (hence the considerable divergence in numbers of provisions).
93 Lerner and Rabello 2011 *AJCL* 767.
94 Koziol "Changes in Israeli Tort Law" 141.
95 Lerner and Rabello 2011 *AJCL* 768 citing Mautner 2006 *Mishpatim* 199, 245.
96 Lerner and Rabello 2011 *AJCL* 769.
97 Rabello and Lerner "Project of the Israeli Civil Code" 801; Lerner and Rabello 2011 *AJCL* 769, 775

contract law (as found in the Breach of Contract Law 1970), principles of the law of trusts (as found in the Trust Law 1979) and principles of the law of tort (as found in the Tort Ordinance 1947). The end result seems to be that this will be a Code which is predominantly of Continental legal orientation, when it comes to overall framework, structural ideology and style[98] but, certainly, of Common law orientation, when it comes to the preponderance of legal substance.

The Israeli Civil Code seems to resemble an automobile featuring classic European design in its overall outlook[99] but an Anglo-American engine in its main operations. Thus:

> The beauty, performance and elegance of a European car chassis and body style with an American engine, usually a powerful V8, results in a very fast, small car that is suitable to win races or just to drive around, have fun and look great.[100]

Our small car (and a small car it is, due to its laconic character and limited set of provisions) is the Israeli Civil Code but there is beauty and strength in this car, if we are allowed to draw such a metaphor. This is a *sui generis* code[101] but it is not so, because the Israelis did not prefer foreign legal solutions; on the contrary, the Israelis, already since the inception of their modern State, have shown preference to foreign legal solutions. Rather we should speak of a *sui generis* legal code, because the Israelis mixed solutions in a unique way by borrowing and mixing quintessentially continental framework essence and common law substance. In this respect, the Code reflects many of the particularities of the modern Israeli legal culture making a code "*à la Israélienne*".[102]

8 Conclusion: The Israeli legal system as a system of legal *kinesis*

The Israeli legal system is a system characterised by legal *kinesis*; it is not a system of legal *stasis*. In principle, then, legal *kinesis* is a healthy phenomenon. This is a

98 Koziol "Changes in Israeli Tort Law" 141.
99 Yet not all of the Code's legal design is of Continental jurisprudence: see e.g. the inclusion of definitions in the introductory part of the Code: Rabello and Lerner "Project of the Israeli Civil Code" 801.
100 Smashwords 2011 www.smashwords.com.
101 Lerner and Rabello 2011 *AJCL* 771.
102 Rabello and Lerner "Project of the Israeli Civil Code" 785.

system which is still mixing[103] information in all sorts of different ways. Combining, as a matter of clear historical choice, the traditions of the civilians and the common lawyers, the forces of liberalism and secularity with the forces of traditionality, whilst striving to balance the expectations of the Jewish and the Arab element in the same State, Israel stands for a legal system truly unique in the world. This mixing can have a positive aspect but also a negative aspect, especially if such mixing is not 'digested'. The Israeli legal system, and by extension, Israel, stands for a State that is democratic, liberal and multicultural. Such a state of affairs is not without criticism. Criticism does not relate to the fundamentals of the Israeli legal system but to certain particularities which have been briefly touched upon in the analysis. Not everything is perfect or ideal in the legal system of this *new* State. There is space for improvement, especially with regard to the appointment mechanism of Israel's Supreme Court judges and the further integration of the Arab element into the Israeli society by further embracing this minority in the country.

Systems then are judged in their particulars but also as a whole. Our assessment has shown that Israel, in its particularities and as a whole, is at the forefront of legal development, especially with regard to its most pro-active Supreme Court's judiciary and with regard to the amalgamating character of the system as a whole. This makes for a *developing* legal system of a largely enigmatic nature. Its enigmatic nature comes out of the fact that Israel's legal mechanisms are in constant development and not fully concretised just yet. Israel has crystallised as a State but many of its laws are still in the process of crystallisation. For instance, the absence of a unified constitutional code in the State shows that this system, as a socio-legal perception, is still in development; so is its society *per se*. Israel stands for a socio-legal reality comprising the different worlds of traditionality and modernity just like Israel itself comprises very different cities such as those of Jerusalem and Tel Aviv in the same State.[104] Beyond this, the developmental nature of the Israeli legal system creates an enigma to the comparatist. But the enigma of the system in question, if resolved, hides unique features which in their combination make, in turn, a unique legal system.

103 Goldstein "Israel" 449.

104 On the degree of variance between Tel Aviv and Jerusalem in the context of globalisation, see Alfasi and Fenster 2005 *Cities* 351-363.

Israel is a young[105] legal system and so it should be judged. Youth comes with mistakes and omissions but there is wild beauty in youth. It is the author's conviction that there is beauty in the legal system of Israel. Yet that legal system in question has been perceived in a number of different ways around the world. The Israelis need to ensure that their State for which they fought so much from its creation in 1948 stands out as an example of a democratic state, not just in the Middle East, but also around the world. For this goal all the citizens of this State, Jews and Arabs, must strive. The judges, the lawyers and all those who deal with the law in the State of Israel are well aware of this.

On occasion, then, it is not only who you are but also how the image of yours comes out to the world. The Greeks have called this the world of the phenomenon and the epiphenomenon. The Israelis must ensure that the world of the phenomenon of their State improves, for it would not make justice to their State, if they only ensured that it is the world of the epiphenomenon that is dealt. Israel, as these lines are written, stands at the forefront of world legal developments in projects in the public law and the private law sphere. A unified Constitutional Code is more strongly than ever before advocated. A Civil Code is in the making. A legal renaissance takes place in Israel. In codification terms, Israel resembles nowadays to some extent the legal renaissance of Europe in the 19th and the 20th century, when the French and the Germans would define[106] their States by way of novel pieces of codified legislation.[107]

Innovation, liberalism and development are perhaps they three key words that define the mechanics of legal operations within Israel. Paradoxically, the author, as an academic of European descent, notices with considerable regret that Israel is not known for any of these traits. For this reason, it must be stressed that Israel is known for the wrong reasons when it reaches the media. Little is known of the fact that the

105 Lerner and Rabello 2011 *AJCL* 765.

106 That is not to say that Israel would need a Civil Code to define its element of territoriality. The stress here is on legal innovation rather than re-defining Israeli territoriality through the new Israeli Civil Code. See Rabello and Lerner "Project of the Israeli Civil Code" 788 citing Grossi *Assolutismo Giuridico* 3ff and 264ff; Siehr "Draft Civil Code for Israel" 237.

107 *Cf.* Rabello and Lerner "Project of the Israeli Civil Code" 786; Lerner and Rabello 2011 *AJCL* 798.

very core of the Israeli legal system, the Supreme Court of the State, is made out of liberal judges who would match their liberal colleagues in Europe and America; little is known of the fact that members of the Israeli military have been brought before Israeli justice for abuses of human rights.

Life is made out of dreams and realities. Legal systems, in the essence of the matter, are not about laws, frameworks and lawyers; they are about dreams and realities; Israel is one of those systems combining dreams and realities. Certain dreams and realities forged and forge the modern legal system of Israel. Yet, Israel's legal realities are not always readily apparent or perceptible to the observer. This lack of realisation makes for the creation of a legal enigma: the Israeli legal enigma.

This brings us to our conclusion. We have examined the enigmatic but certainly unique nature of a young legal system, that of Israel. Legal developments of wide-ranging character are the case in Israel, whilst Israel could boast the most liberal Supreme Court in the world. This makes for a system of considerable legal beauty. Amidst legal innovation and legal tradition, this is a system which, in legal terms, straddles the worlds of the common law and continental law, the worlds of traditionality and modernity. Close to this dual hybrid legal nature of modern Israeli law, the Israelis have foreseen the value of comparative legal research in the lawmaking processes of their young State. Together with this one opines that Israel will certainly flourish further when the crystallisation of its laws will materialise further. The author would like to see this occurring in the foreseeable future so that the enigma which this legal system hides is fully resolved.

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List of abbreviations

AJCL	American Journal of Comparative Law
B U L Rev	Boston University Law Review
EJCL	Electronic Journal of Comparative Law
EJIL	European Journal of International Law
ICON	International Journal of Constitutional Law
Is L R	Israel Law Review
St Louis U L J	St Louis University Law Journal